No. 85-5189

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

LAMONT JULIUS MCLAUGHLIN,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether a conviction for use of a dangerous weapon during a bank robbery, in violation of 18 U.S.C. § 2113(d), despite proof by the government that the weapon used was an unloaded handgun, violated petitioner's right to a fair trial?

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OPINIONS BELOW

The unreported order of the United States Court of Appeals for the Fourth Circuit summarily affirming Mr. McLaughlin's conviction and deconsolidating his appeal from an appeal in a related case is found in the Joint Appendix (hereinafter designated "J.A.") at 16. The district court's oral denial of Mr. McLaughlin's motion for judgment of acquittal is found at J.A. 11.

JURISDICTION

The judgment of the Court of Appeals was entered on June 5, 1985. J.A. 16. A petition for writ of certiorari was filed August 5, 1985, and was granted on November 4, 1985. J.A. 18.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The fifth amendment to the Constitution provides in pertinent part:

> No person shall be * * * deprived of life, liberty, or property, without due process of law * * *.

2. 18 U.S.C. § 2113(a) provides, in part:

> Whoever, by force and violence, or by intimidaton, takes, or attempts to take, from the person or presence of another any property or money or any other thing of value belonging to, or in the care, custody, control, management, or possession of, any bank, credit union, or any savings and loan association * * * shall be fined not more than $5,000 or imprisoned not more than twenty years, or both.

3. 18 U.S.C. § 2113(d) provides, in part:

> Whoever, in committing, or in attempting to commit, any offense defined in subsection (a) and (b) of this section, assaults any person, or puts in jeopardy the life of any person by the use of a dangerous weapon or

device, shall be fined not more than $10,000 or imprisoned not more than twenty-five years, or both.

STATEMENT OF THE CASE

JUDICIAL HISTORY

The judicial history of this case is detailed in the Petition for Writ of Certiorari at 4-6. It is briefly summarized here.

Mr. McLaughlin and a co-defendant[1] were indicted on charges of bank robbery, bank larceny, and assault with a dangerous weapon during the commission of these offenses, in violation of 18 U.S.C. §2113(a), (b), (d), (f). J.A. 4-6. On September 9, 1984, Mr. McLaughlin entered pleas of guilty to the bank robbery and bank larceny charges (counts one and two of the indictment). The statement of facts proffered by the government as a predicate for Mr. McLaughlin's guilty plea was accepted by all parties as the stipulated evidence on which a bench trial was held on the dangerous weapon charge (count three). The district court denied Mr. McLaughlin's motion for judgment of acquittal, convicted Mr. McLaughlin of the offense stated in the third count of the indictment and accepted his guilty pleas to counts one and two. J.A. 8-13.

The trial court sentenced Mr. McLaughlin to the maximum twenty-five years imprisonment on the dangerous weapon charge, the maximum twenty years imprisonment on the assault charge, and eight years imprisonment on the bank larceny charge. These sentences are to be served concurrently. J.A. 14.

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[1] Mr. McLaughlin was indicted with Ronald Tryone Hall. Mr. Hall was not part of the appellate proceedings below and is not part of this proceeding.

Mr. McLaughlin filed a timely appeal before the United States Court of Appeals for the Fourth Circuit. Upon Mr. McLaughlin's request his appeal was consolidated, on April 10, 1985, with the appeal in the unrelated case of *United States* v. *Johnson*[2] because the sole issue in Mr. McLaughlin's appeal was one of several issues in the *Johnson* appeal.

On April 11, 1985, the consolidated appellants filed a Suggestion for Initial Hearing *In Banc*. The government filed a consolidated brief in opposition and also moved for deconsolidation and summary affirmance of Mr. McLaughlin's appeal. After a response from Mr. McLaughlin, the Fourth Circuit deconsolidated Mr. McLaughlin's appeal and summarily affirmed his conviction. J.A. 16. The proceeding before this Court has followed.

STATEMENT OF FACTS

The facts of this case are not in dispute. The government's evidentiary proffer at Mr. McLaughlin's guilty plea to bank robbery and larceny became the stipulated evidence on which a bench trial was conducted on the dangerous weapon count of the indictment.

At 9:30 a.m. on July 26, 1984, two black males wearing gloves and stocking masks entered the federally insured Equitable Bank at Cedonia Mall, Radecke Avenue, Baltimore, Maryland. One of these men was Mr. McLaughlin, who positioned himself in the lobby area and, at gunpoint, ordered everyone in the bank to put up their hands and not to move. The other was Ronald Hall, Mr.

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[2] The Federal Public Defender's Office for the District of Maryland represented Lawrence Edward Johnson, Jr., in Fourth Circuit Case No. 83-5268, as well as Mr. McLaughlin.

McLaughlin's former co-defendant. Mr. Hall vaulted over the tellers' counter and ordered one of the tellers to open a money drawer. After Mr. Hall removed the money from that drawer he repeated the procedure with another teller. When Mr. Hall noticed a Baltimore City police officer outside the bank, Mr. Hall and Mr. McLaughlin left the bank.

As they ran out of the bank, they were immediately confronted by the Baltimore City police officer, who held them at gunpoint until police support arrived. At that time, various items were seized from Mr. McLaughlin and his former co-defendant, including a brown paper bag containing $3400 in United States currency bound with bank wrappers, a stocking mask, rubber gloves, and the handgun displayed by Mr. McLaughlin while he stood in the lobby of the bank. J.A. 8-9. As the government indicated during its evidentiary proffer: "(T)he evidence would show (that this handgun) was not loaded." J.A. 9.

Mr. McLaughlin initially used an alias, but was quickly identified. He confessed to this crime and implicated his co-defendant. J.A. 9-10.

Based on this factual predicate, Mr. McLaughlin was indicted for bank robbery, bank larceny, and using a dangerous weapon during a bank robbery. Count one of the indictment alleges that he "did by intimidation, take from the presence of (the tellers) . . . the deposits . . ." in violation of § 2113(a). J.A. 4. Count three alleges that "in committing the offenses charged in the first two counts of this indictment (Mr. McLaughlin) did assault (the tellers) . . ., by pointing a firearm at them and in their direction" in violation of § 2113(d). J.A. 5.

Mr. McLaughlin pled guilty to counts one and two, which charged volations of 18 U.S.C. § 2113(a) and (b). He

was convicted after a bench trial on count three, the § 2113(d) violation.

INTRODUCTION AND SUMMARY OF ARGUMENT

Mr. McLaughlin was deprived of his fifth amendment right to due process of law when he was convicted for using an unloaded handgun during a bank robbery in violation of 18 U.S.C. § 2113(d).

In *United States* v. *Bennett*, 675 F.2d 596, 599 (4th Cir.), *cert. denied*, 456 U.S. 1011 (1982),[3] the United States Court of Appeals for the Fourth Circuit ruled that a weapon exhibited by a robber during a bank robbery is a dangerous weapon as a matter of law whether loaded or unloaded. This decision places the Fourth Circuit with the Fifth Circuit, Sixth Circuit, Tenth Circuit, and Eleventh Circuit in adopting the subjective approach to analyzing evidence sufficient for conviction under 18 U.S.C. § 2113(d). These circuits are primarily concerned with the subjective fear of bank robbery victims rather than the objective capability of the robber's weapon.

The Second Circuit, Third Circuit, Seventh Circuit, Eighth Circut, and Ninth Circuit reject this approach. These courts require evidence that the weapon was objectively capable of carrying out the threat apparently posed by it.[4]

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[3] It is clear from the trial court proceedings and the Motion for Summary Affirmance that Mr. McLaughlin's conviction under 18 U.S.C. § 2113(d) rests on the Fourth Circuit's decision in *Bennett*. J.A. 7-8, 10-11.

[4] The law in the First Circut is not as clear. In *United States* v. *Boyle*, 675 F.2d 430, 433 (1st Cir. 1982) (affirming a conviction based on accomplice liability) the court approved an instruction that the jury must find that the gun "was capable of being fired and inflicting serious bodily harm." In *United States* v. *Harrison*, 522 F.2d 693 (D.C. Cir. 1975), the Court followed the Second Circuit.

Thus, the United States Circuit Courts of Appeals are divided as to whether an unloaded weapon (in this case a handgun) provides a sufficient predicate for conviction under 18 U.S.C. § 2113(d), either as a matter of fact or a matter of law.

Mr. McLaughlin argues that to allow a defendant to be convicted of using a dangerous weapon during a bank robbery when there is uncontroverted proof that the weapon was an unloaded handgun renders the word "dangerous" in § 2113(d) meaningless, effectively amends the statute by judicial decision, and vitiates any meaningful distinction between § 2113(a) and § 2113(d). In addition, when the *Bennett* decision is applied to cases like Mr. McLaughlin's, persons accused of violating 18 U.S.C. § 2113(d) are presumptively convicted of that charge in violation of the principle announced in *In re Winship*, 397 U.S. 358 (1970). *See County Court of Ulster County, New York* v. *Allen*, 442 U.S. 140, 156, 167 (1979); *Mullaney* v. *Wilbur*, 421 U.S. 684 (1975). Under *Bennett*, as long as a weapon is used in the commission of a bank robbery, the government bears no burden of proving that the weapon was a dangerous weapon as understood in § 2113(d). Neither may one accused of violating § 2113(d) offer any evidence that the weapon was not dangerous.

ARGUMENT

I. IT IS A DENIAL OF AN ACCUSED'S RIGHT TO A FAIR TRIAL TO RULE THAT DISPLAYING AN UNLOADED HANDGUN DURING A BANK ROBBERY IS—AS A MATTER OF LAW—EQUIVALENT TO USING A DANGEROUS WEAPON DURNG A BANK ROBBERY

In *United States* v. *Bennett*, 675 F.2d 596 (4th Cir.), *cert. denied*, 456 U.S. 1011 (1982), the United States Court of Appeals for the Fourth Circuit ruled that "(a)

weapon openly exhibited by a robber during a robbery is a dangerous weapon whether loaded or unloaded, and such exhibition violates § 2113(d)." *Id.* at 599. By this ruling, the Fourth Circuit joined the Fifth, Sixth, Tenth and Eleventh Circuits in adopting a subjective approach to analysis of weapons violations under 18 U.S.C. § 2113(d). Directly opposed to this approach is the objective analysis followed by the First, Second, Third, Seventh, Eighth and Ninth Circuits. Mr. McLaughlin contends that the Fourth Circuit's position (and, by implication, the position of the other "subjective" Circuits) is constitutionally defective because it establishes a conclusive presumption of dangerousness that violates a basic rule of statutory construction as well as the rule of *In re Winship*, 397 U.S. 358 (1970), which forbids shifting the burden of proof in a criminal case away from the government.

A. An Unambiguous Statute Should Be Applied According To Its Terms. It Should Neither Be Rewritten Nor Interpreted By Judicial Decision

In enacting what is now 18 U.S.C. § 2113(d), Congress addressed a specific problem: "The use of dangerous weapons—most particularly firearms—to commit federal felonies." *Simpson* v. *United States*, 435 U.S. 6, 10 (1978). In enacting this legislation, Congress was responding to a nationwide request that the federal government help protect banks from robbery by "organized gangsters." *Id.*, n.4, *citing* S. Rep. No. 537, 73d Cong., 2d Sess., 1 (1934); H.R. Rep. No. 1461, 73d Cong., 2d Sess., 2 (1934). Although the legislative history of § 2113(d) is scanty, the decisions of this Court make clear that § 2113(d) proscribes the use of a dangerous weapon[5] in assaulting or

[5] The words "or device" were added to the proposed statute after debate on the House floor. *Simpson*, 435 U.S. at 10 n.4, *citing* 78 Cong. Rec. 8132-33 (1934).

jeopardizing the life of any person during a bank robbery. *Id.* at 11-12 n.6. While it may not have been clear until *Simpson* that the phrase "dangerous weapon" applied to both assaults or the jeopardizing of life (both of which are, in the alternative, outlawed by section 2113(d)), it was clear that the weapon referred to in this section was a "dangerous" weapon. That terminology appears from the very first in the available legislative history. Any ambiguity in the term "dangerous weapon" has been created by judicial decision.

By establishing a rule that any weapon openly exhibited during a bank robbery "is a dangerous weapon whether loaded or unloaded," *Bennett*, 675 F.2d at 599, the Fourth Circuit has engaged not only in unwarranted statutory construction, but statutory amendment. Under the *Bennett* decision, the word "dangerous" is effectively removed from § 2113(d) because any weapon becomes, as a matter of law, a dangerous weapon, provided it is exhibited during a bank robbery. In ruling as it did, the Fourth Circuit interpreted the word "dangerous" as describing the setting rather than the weapon. This interpretation of the word "dangerous" is not warranted. In fact, no interpretation is warranted. On its face, the statute states clearly that it is the weapon, and not the setting, that must be dangerous. The statutory history of § 2113(d) addresses the use of a dangerous weapon, as opposed to the use of any weapon in a dangerous setting. It is error for the Fourth Circuit to go beyond the plain meaning of an unambigious statute and alter its meaning beyond the original congressional intent "absent clear evidence of contrary legislative intention." *United States* v. *Apfelbaun*, 445 U.S. 115, 121 (1980). *See United States* v. *Turkett*, 452 U.S. 576, 580 (1981); *Russello* v. *United States*, 464 U.S. 16, 20 (1983).

B. An Irrebuttable Presumption That Any Weapon Used During A Bank Robbery Is, As A Matter Of Law, A Dangerous Weapon, Goes Beyond The Proper Use Of Presumptions In § 2113(d) Litigation And Violates The Principles Of Winship

The term "dangerous weapon" in § 2113(d) applies to both the assaultive conduct and the jeopardizing of life contemplated by that statute. *Simpson*, 435 U.S. at 11-12 n.6.[6] If this were not the case, the conduct proscribed by § 2113(a) (bank robbery "by force and violence, or by intimidation") would also be punishable by § 2113(d) without requiring "the commission of something more than the elements of . . . § 2113(a)." *Id.* at 12 n.6, *quoting*, *United States* v. *Beasley*, 438 F.2d 1279, 1283-84 (6th Cir. 1971) (McCree, J., concurring in part and dissenting in part). It is Mr. McLaughlin's position that a federal bank robbery assault, committed with a weapon that is not dangerous, is punishable only under § 2113(a). For enhanced punishment under § 2113(d), the weapon must, in fact, be dangerous as a weapon. It must be loaded, that is, "objectively capable of putting a victim's life in danger." *United States* v. *Cobb*, 558 F.2d 486, 488-89 (8th Cir. 1977).

Since enactment of the Federal Bank Robbery Statute, a line of cases has dealt with the nature of the govern-

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[6] Some cases have referred to § 2113(d) as the dangerous weapon statute. *See, e.g., Bennett*, 675 F.2d 596. Some refer to it as an enhanced penalty statute. *See, e.g., United States* v. *Cobb*, 558 F.2d 486 (8th Cir. 1977). Others have referred to this section as the aggravated bank robbery section. *See, e.g., United States* v. *Beasley*, 438 F.2d 1279 (6th Cir.), *cert. denied*, 404 U.S. 866, *reh. denied*, 404 U.S. 1006 (1971). Because these are terms of description rather than legal definition they are used here interchangeably.

The Fourth Circuit views 18 U.S.C. § 2113 as stating lesser and greater included offenses. *United States* v. *Whitley*, 759 F.2d 327 (1985) *(en banc)*.

ment's proof that the weapon used during the bank robbery was a dangerous weapon, turning on whether a conviction under § 2113(d) could be sustained when there was no direct evidence that the weapon used during a bank robbery was dangerous. The courts had to consider the sufficiency of circumstantial evidence on § 2113(d) charges. The judicial response unanimously has been to allow a jury to infer the objective dangerousness of a weapon from evidence that a weapon was used, absent proof to the contrary. *See, e.g., United States* v. *Terry*, 760 F.2d 939 (9th Cir. 1985); *Bennett*, 675 F.2d at 599 (4th Cir. 1982); *United States* v. *Davis*, 560 F.2d 144 (3rd Cir.), *cert. denied*, 434 U.S. 839 (1977); *United States* v. *Newkirk*, 481 F.2d 881 (4th Cir. 1973); *United States* v. *Shelton*, 465 F.2d 361 (4th Cir. 1972); *United States* v. *Roustio*, 455 F.2d 366 (7th Cir. 1972); *United States* v. *Waters*, 461 F.2d 248 (10th Cir.), *cert. denied sub nom. Robins* v. *United States*, 409 U.S. 880 (1972); *United States* v. *Marshall*, 427 F.2d 434 (2d Cir. 1970); *United States* v. *Roach*, 321 F.2d 1 (3rd Cir. 1963).

When the evidence that the gun was objectively dangerous is circumstantial, and the defendant has offered evidence that the gun was not objectively dangerous, resolution of the matter is left to the jury. The jury must find beyond a reasonable doubt that the weapon was a dangerous weapon because it was objectively capable of inflicting the harm threatened by its use. *Terry*, 760 F.2d at 942; *Davis*, 560 F.2d at 147-48 (and cases cited therein). *See Ulster County Court* v. *Allen*, 422 U.S. at 167. *See also United States* v. *Waters*, 461 F.2d at 252 (a Tenth Circuit pre-*Crouthers* case).

In 1969, the Fifth Circuit went beyond prior case law in switching from an objective to a subjective analysis. It held "that a gun used in connection with and at the scene

of a bank robbery is as a matter of law a dangerous weapon and that those on the immediate scene of the robbery are placed in an objective state of danger regardless of whether there is proof that the gun was loaded." *Baker* v. *United States*, 412 F.2d 1069, 1072 (5th Cir. 1969), *cert. denied*, 396 U.S. 1018 (1980).[7] The Sixth Circuit announced a reasonable victim test in *United States* v. *Beasley*, 438 F.2d 1279 (6th Cir.), *cert. denied*, 404 U.S. 866, *reh. denied*, 404 U.S. 1006 (1971). The test is not whether the weapon was in fact dangerous, but whether the victim perceived it to be. The Tenth Circuit adopted this approach in *United States* v. *Crouthers*, 669 F.2d 635, 639 (1982).

In establishing the subjective approach to § 2113(d) analysis, the Fifth Circuit found the logical base for its decision in *Baker* in fact that "(a) gun is commonly known, regarded and treated by society as a dangerous device by both the reasonable man and the person at whom it is pointed, without pause to determine whether a round is in the chamber." *Id.* at 1071-72. The Fifth Circuit noted that it is the nature of the gun to harm by discharging bullets. *Id.* at 1072. That fact, combined with a weapon's "appar-

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[7] *Baker* was followed in *United States* v. *Parker*, 542 F.2d 932 (5th Cir. 1976), *cert. denied*, 430 U.S. 918 (1977). There, however, the court seemed to return to an objective test, noting that "the legal question . . . is . . . whether, objectively speaking, a 'life [was] actually placed in danger.'" *Id.* at 934. The court then abandons both the objective and subjective approaches and states that "(t)he use of a gun is *per se* sufficient cause to impose the enhanced sentence." *Id.*, *citing Baker*, 412 F.2d at 1072.

In 1983, the Eleventh Circuit adopted this irrebuttable presumption (or *per se* rule) that a weapon used during a bank robbery is as a matter of law a dangerous weapon. *United States* v. *Tutt*, 704 F.2d 1567, 1568 (1983).

ent capacity to carry out that harm," *id.*, combined with the highly charged atmosphere and possibility of police intervention, creates a "complex of circumstances in which the person on the scene is in jeopardy of harm which may occur in any one of various ways." *Id.*

The Fourth Circuit followed this subjective analysis when it decided *Bennett* in 1982. 675 F.2d 596. Whether a gun is loaded or unloaded, "(t)he same danger, apprehension, and tension are created" when the weapon is exhibited during a bank robbery. It threatens victims and bystanders alike." *Bennett*, 675 F.2d at 599.

In both *Baker* and *Bennett*, the only statement tending to show that a weapon is intrinsically dangerous is that made by the Fifth Circuit: "The primary capacity of a gun to harm—by the discharge of a bullet from the muzzle . . .." *Baker*, 412 F.2d at 1072. However, it is not the primary capacity of a gun to harm. It is the primary capacity of a gun to discharge a bullet from the muzzle. It is the use of the gun that causes harm. The remaining comments from both *Baker* and *Bennett* address the dangerousness of the situation created during a bank robbery. There is no gainsaying that these situations are dangerous. However, § 2113(d) of the Federal Bank Robbery Statute does not address itself to dangerous situations as § 2113(a) does. Rather, § 2113(d) focuses on dangerous weapons. The use of a dangerous weapon (and not the creating of a dangerous situation) is subject to enhanced punishment under § 2113(d).

This unwarranted and erroneous statutory interpretation has led the Fourth, Fifth, Sixth, Tenth and Eleventh Circuits to establish unconstitutional irrebuttable presumptions. These Circuits take the dangerous weapon issue away from the jury. No longer need a jury infer that

a weapon used during a bank robbery is dangerous. No longer may an accused offer proof that the weapon used was not dangerous. Rather, if a weapon was used, it is conclusively presumed to have been a dangerous weapon. *United States* v. *Tutt*, 704 F.2d 1567, 1568 (11th Cir. 1983); *Bennett*, 675 F.2d at 599; *Parker*, 542 F.2d at 934.[8]

In *Simpson*, this Court noted that ". . . (i)n order to give lawful meaning to Congress' enactment of the aggravating elements in 18 U.S.C. § 2113(d), the phrase 'by the use of a dangerous weapon or device' must be read, regardless of punctuation, as modifying both the assault provision and the putting in jeopardy provision." 435 U.S. at 12, *quoting Beasley*, 438 F.2d at 1283-84 (McCree, J., concurring and dissenting in part). Similarly, § 2113(d) must be read as requiring proof that the weapon used during the bank robbery was, in fact, dangerous. To allow the irrebuttable presumptions of the Fourth, Fifth and Eleventh Circuits to stand (and the subjective approach in general), is to render the dangerous weapon requirement of § 2113(d) meaningless, for the phrase "dangerous weapon" is then synonymous with the unmodified word "weapon." Although the Fourth, Fifth and Eleventh Circuits stop short of this legislative amendment, the interpretation followed by those Circuits is perhaps a more insidious violation of an accused's fair trial rights.

The establishment of the irrebuttable presumption lifts from the government its burden of proving beyond a reasonable doubt that a dangerous weapon was used during a bank robbery in either assaulting or jeopardizing the life of a person. Perhaps the best example of this is the indict-

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[8] It is not clear whether the Sixth and Tenth Circuits have adopted an irrebuttable presumption or only the subjective approach. *See, e.g., Crouthers*, 669 F.2d 635; *Beasley*, 438 F.2d 1279.

ment brought against Mr. McLaughlin, an indictment proper under the Fourth Circuit's decision in *Bennett*. Count three of that indictment alleges that Mr. McLaughlin, in committing the offenses described in § 2113(a) and (b), "did assault (the bank tellers) . . . by pointing a firearm at them and in their direction . . .." J.A. 5. There is no allegation that Mr. McLaughlin used a dangerous weapon in connection with an assault or in connection with the placing in jeopardy of anyone's life. Rather, language common to unenhanced assault charges is used. *See Bradley* v. *United States*, 447 F.2d 264, 274 n.19 (8th Cir. 1971) (and accompanying text). Thus, the *Bennett* decision in the Fourth Circuit has effectively altered the requirements of § 2113(d) and has taken from the government its burden of proof that an accused must have used a dangerous weapon during a bank robbery. This is a violation of the rule of *In re Winship*, 397 U.S. 358 (1970). In *Winship*, this Court ruled that the government must prove each and every element of an offense charged by proof beyond a reasonable doubt. *See Mullaney* v. *Wilbur*, 421 U.S. 684 (1975). *See also* Ponsoldt, *A Due Process Analysis of Judicially-Authorized Presumptions in Federal Aggravated Bank Robbery Cases*, 74 J. Crim. L.C. 363, 372-76 (1983). These errors of constitutional magnitude are not present among those circuits that follow an objective approach to § 2113(d) analysis.

The First, Second, Third, Seventh, Eighth, and Ninth Circuits have found that § 2113(d) requires more than a mere bank robbery with force and fear. *United States* v. *Roustio*, 455 F.2d at 371 (7th Cir.). Under § 2113(d), the concern is not whether weapons were used, but whether they are operable. *United States* v. *McAvoy*, 574 F.2d 718 (2nd Cir. 1978). That is, the weapons used must be "objectively capable of causing harm, *i.e.*, that the gun be loaded

and operable." *Terry*, 760 F.2d at 942 (9th Cir.); *United States* v. *Fraser*, 688 F.2d 56, 57-58 (8th Cir. 1982).

As explained by the Eighth Circuit, the conduct proscribed by § 2113(a) only rises to the status of an aggravated assault (or of putting lives in jeopardy) when there is "in addition a threat or attempt to inflict bodily harm *coupled with the present ability* to commit violent injury upon the person of another." *Bradley* v. *United States*, 447 F.2d 264, 273 (8th Cir. 1971) (emphasis is original). The apparent intentions of the robber, the apparent ability to inflict bodily harm, and the reasonable apprehension of the victim are not enough to warrant enhanced punishment under § 2113(d). *Id.* at 274. Otherwise, sections 2113(d) and 2113(a) are redundant. *Id.* at 274-75. To be convicted of assault by dangerous weapon during a bank robbery, there must be proof of the objective capability of the weapon "to cause physical harm to the victim by the means threatened." *Id.* at 275.

This approach is effected by allowing juries to infer the objective capability of a weapon used during a bank robbery. Whether this is described as the jury's right to infer dangerousness, or as the establishment of a presumption of dangerousness capable of being rebutted by proof to the contrary, the result is that the "dangerous weapon" provision of § 2113(d) is preserved and given to the jury as an issue of fact to be decided. The jury must conclude that the weapon was objectively capable of carrying out the threat, beyond a reasonable doubt. The merely apparent ability of the weapon to cause harm is not enough. *McAvoy*, 574 F.2d at 722 (2d cir.); *Marshall*, 427 F.2d at 437 (2d Cir.). Absent evidence to the contrary, a jury would be correct in inferring (or presuming) that the weapons used during a bank robbery were dangerous from the mere fact that weapons were exhibited. *See*,

United States v. *Archibald*, 734 F.2d 938, 943, *modified*, 756 F.2d 223 (2d Cir. 1984); *United States* v. *Brannon*, 616 F.2d 413, 419 (9th cir.), *cert. denied sub nom. Cox* v. *United States*, 447 U.S. 908 (1980); *United States* v. *Roach*, 321 F.2d at 5 (3rd Cir.).

The advantage of this approach is that it keeps § 2113(d) intact, keeps the burden of proof as to all elements of a criminal charge upon the government, and does not deprive an accused of a defense implicit in the statute: that the weapon was not dangerous.

However, Mr. McLaughlin takes the position that a bank robbery committed with an unloaded handgun is not, as a matter of law, a violation of § 2113(d). *Terry*, 760 F.2d at 942; *Fraser*, 688 F.2d at 57-58 (and cases cited therein); *United States* v. *Hudson*, 564 F.2d 1377, 1379 (9th Cir. 1977). In ruling that an unloaded handgun cannot provide the basis for a conviction under § 2113(d), the United States District for the Northern District of California, in *United States* v. *Potts*, 548 F. Supp. 1239 (1982), rejects the arguments of the Fourth Circuit in *Bennett*. The possible fear of the victim, the possible use of a handgun for pistol whipping, and the possibility of a violent response by police or bank guards is not a sufficient aggravation of § 2113(a) to warrant conviction under § 2113(d). If it were, it would destroy any distinction between those statutes. *Id.* at 1241.

The *Potts* court applied the objective capability test and found that proof that the handgun was loaded would be sufficient proof to support a conviction for using a dangerous weapon during a bank robbery. It rested its decision in part on the Ninth Circuit's ruling in *United States* v. *Coulter*, 474 F.2d 1004, *cert. denied*, 414 U.S. 833 (1973). In *Coulter* the Ninth Circuit ruled that a § 2113(d)

assault requires proof of an assault "plus 'a threat or attempt to inflict bodily harm, coupled with the present ability to commit violent injury upon the person of another.'" *Potts*, 548 F. Supp. 1241, *quoting Coulter*, 474 F.2d at 1005. A dangerous weapon must actually be used during the robbery and must actually place in an objective state of danger the life of the person being robbed. *Id.*

In Mr. McLaughlin's case, the Government's unrebutted proof that the handgun he displayed in the lobby of the bank was unloaded should, as a matter of law, prevent his conviction for a violation of § 2113(d).

At the very least, the issue should remain one for the jury. It should never be conclusively presumed that a weapon used during a bank robbery is, without more, a dangerous weapon according to § 2113(d) as a matter of law.[9] Instead of establishing inadvisable conclusive presumptions, the Court should allow the fact-finder to consider both the nature of the weapon used and the use made of that weapon.

Thus, the use of a loaded handgun during a bank robbery (whether established by inference or direct proof) would be sufficient for a violation of § 2113(d). Similarly, a pistol whipping with an unloaded handgun might be sufficient for a violation of § 2113(d). In the first instance, a weapon intrinsically dangerous is used. In the second instance, a sufficiently aggravating dangerous use is made of the weapon so as to satisfy § 2113(d). The Court

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[9] This is especially true given that this exact conduct is punishable under 18 U.S.C. § 924(c) (as amended by Pub. L. 98-473, Title II, § 1005(a), October 12, 1984, 98 Stat. 2138). In Mr. McLaughlin's case, the issue is not whether a charge under 18 U.S.C. § 924(c) an be sustained in addition to 18 U.S.C. § 2113(d), but whether a § 2113(d) charge can be sustained at all.

should hold unconstitutional the irrebuttable presumption that any weapon loaded or unloaded is dangerous. The Court should also disallow any conviction under § 2113(d) based solely on the actions of the victims. As has been stated above, the fear of a victim and the potentially dangerous circumstances created by a bank robbery are not in themselves sufficient evidence that the weapon used was dangerous.

It is Mr. McLaughlin's position that committing a bank robbery with an unloaded handgun is, as a matter of law, not a violation of 18 U.S.C. § 2113(d). At the very least, this Court should hold unconstitutional the Fourth Circuit's decision in *Bennett* (and, by implication, similar decisions in other circuits) that establish an irrebuttable presumption that any weapon used during a bank robbery is, as a matter of law, a dangerous weapon. At a minimum, the question should remain a jury question on which the government must carry its burden of proof and against which an accused may offer a defense.

II. GENERALLY POINTING AN UNLOADED HANDGUN IN THE LOBBY OF A BANK DURING A ROBBERY IS NOT THE CONDUCT PROSCRIBED BY § 2113(d)

The evidence in Mr. McLaughlin's case is undisputed.

During his proffer of this evidence, the Assistant United States Attorney stated that the Baltimore City police officer who arrested Mr. McLaughlin also recovered "the handgun which was displayed by Mr. McLaughlin, the person in the lobby, which the evidence would show was not loaded." J.A. 9.[10]

[10] The entire statement of facts proffered by the government in support of Mr. McLaughlin's guilty plea and adopted by both parties for the bench trial on the § 2113(d) charge is contained in the Joint Appendix at 8-12. The relevant portion of the entire proceeding is reproduced in the Joint Appendix at 7-13.

This is not a case where the government offered no proof that the handgun used during the robbery was a dangerous weapon, *i.e.*, loaded. This is not a case where the objective capability of the gun to inflict harm was disputed in contradictory evidence from both parties. Rather, this is a case where the government's own proof is that the handgun used during the robbery was not loaded. That unloaded handgun is not a dangerous weapon within the terms of § 2113(d).

Conceding that an assault was committed under § 2113(a), Mr. McLaughlin's use of an unloaded handgun is not a sufficiently aggravating factor to warrant enhanced punishment under § 2113(d). Not being loaded, the handgun could harm no one through its primary capacity of discharging a bullet from the muzzle. *See Baker*, 412 F.2d at 1072. There is no evidence that Mr. McLaughlin used the handgun in a manner which might bring it within the ambit of § 2113(d). He remained in the lobby area of the bank and generally pointed the handgun at the people in the bank. He did not approach anyone; he did not pistol-whip anyone; he did not threaten to use the gun other than by remaining in the lobby of the bank and pointing it. There is also no evidence as to the perceptions, fears, apprehensions, or anxieties of anyone else within the bank. Even conceding for the sake of argument that Mr. Laughlin's display of the handgun created apprehension and anxiety, this is still not enough to warrant enhanced punishment. In fact, it is exactly the conduct punishable by § 2113(a), to which Mr. McLaughlin pled guilty. His actions in this case certainly amounted to bank robbery "by force and violence, or by intimidation." § 2113(a). Because the weapon he used, and because the use he made of the weapon, was not dangerous, he should not stand convicted of § 2113(d).

Nevertheless, under the Fourth Circuit's decision in *Bennett*, Mr. McLaughlin's violaton of § 2113(a) is, by virtue of his having a weapon (even a non-dangerous weapon), a violation of § 2113(d) as a matter of law. This is the effect of the conclusive presumption that any weapon used in the course of a bank robbery is, whether loaded or unloaded, a dangerous weapon as a matter of law. This presumption removed from the government any burden of proving the weapon Mr. McLaughlin used was actually dangerous. It also took from Mr. McLaughlin a potential truthful defense to a § 2113(d) charge: that the weapon was objectively not dangerous.

It is Mr. McLaughlin's position that, as a matter of law, use of an unloaded weapon during a bank robbery is not a violation of § 2113(d). Even if an unloaded weapon could, under some circumstances, be found to constitute a violation of § 2113(d), the use Mr. McLaughlin made of the weapon in this case does not warrant such a conviction.

At the very least, the Fourth Circuit's *per se* rule announced in *Bennett* should be overruled. Either an unloaded handgun used during a bank robbery is not, as a matter of law, a violation of § 2113(d), or, the issue should be left as a question of fact to be determined by the fact-finder, free from the constraints of conclusive presumptions.

CONCLUSION

The judgment of the Court of Appeals should be reversed and the case remanded for further proceedings consistent with this Court's opinion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and exact copy of the attached Petitioner's Brief was mailed, first class postage prepaid, to The Solicitor General, Department of Justice, Washington, D.C. 20530, this 13th day of December, 1985.

/s/ Stephen J. Cribari
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